UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TROY DEIMERLY,

Plaintiff,

v.

DAVE JOHNSON, *et al*.,

Defendants.

Case No. C06-5002 RBL/KLS

REPORT AND RECOMMENDATION

NOTED FOR: December 15, 2006

This civil rights action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff claims that he was denied proper medical care while he was incarcerated at the Grays Harbor County Jail. Presently before the Court is the motion for summary judgment of Defendant Kathleen Alves. (Dkt. # 44). Defendant Alves argues that she provided medical treatment to Plaintiff consistent with the relevant standard of care. Plaintiff has not responded to the motion. Under Local Rule 7 (b)(2) failure to file papers in opposition to a motion may be deemed as an admission the motion has merit. Having reviewed Defendant Alves' motion, the Court recommends that it be granted and Plaintiff's claims against her be dismissed with prejudice.

I. FACTS

Plaintiff does not dispute Defendant Alves' facts which are as follows:

Defendant Alves is the President of Healthcare Delivery Systems, that provided the contracted medical services for the Grays Harbor County Jail during Plaintiff's incarceration. Defendant Alves holds the designation of Advanced Registered Nurse Practitioner (ARNP). She personally provided care and treatment to Plaintiff during his incarceration at Grays Harbor County Jail between October 4, 2004 and approximately June 23, 2005.

Plaintiff was booked into the Grays Harbor County Jail on October 04, 2004. He did not bring any medications with him. Plaintiff requested medications on October 13, 2004 and was provided the following medications on October 15, 2004:

Gabitril 2mg 2 x day
Risperdal 2 mg 1.5 tabs at night
Phenytoin 100mg 4 tabs at night
Seroquel 200 mg 2 x day
Clonazepam 1 mg 3 x day
Celexa 20 mg daily

Plaintiff was subsequently admitted to Western State Hospital on October 25, 2004 and was released November 17, 2004.

On March 15, 2005, Defendant Alves saw Plaintiff during sick call at the Grays Harbor County Jail for a rash and treated him with hydrocortisone cream. Plaintiff was noted to be quite drowsy and admitted to sleeping during the day.

On April 06, 2005, Defendant Alves ordered laboratory tests to monitor his chronic medications.

On April 13, 2005, Defendant Alves saw Plaintiff for medication issues. Plaintiff told her that he was feeling over medicated and that he had not been taking the prescribed doses. Plaintiff's Dilantin level was high and the dose was reduced with an order to recheck the level in one week. The Seroquel day dose was stopped and the entire dose was rescheduled for evening. The Clonazepam was discontinued with Plaintiff's agreement as he was not taking it as ordered. Defendant Alves referred Plaintiff to Jan Kemmerer, the psychiatric ARNP, for further evaluation.

On April 20, 2005, Defendant Alves saw Plaintiff for a lab draw and a complaint of genital lesions. He voiced no complaints about medication or sleep problems. Plaintiff was again referred to Ms. Kemmerer.

On April 27, 2005, Defendant Alves saw Plaintiff for dental pain. Plaintiff stated a desire to resume the Clonazepam for anxiety. He also requested Adderal for ADD/ADHD issues. Additionally, Plaintiff requested Valtrex for persistent genital lesions. He was treated with Valtrex for presumptive recurrent herpetic lesions. He was prescribed and given Strattera for ADD/ADHD history and anxiety.

On April 27, 2005 Defendant Alves returned a phone call from the jail related to Plaintiff. She was told that Plaintiff had been in an altercation with another inmate and was complaining of nose pain. Defendant Alves advised application of ice, observation, and to call if there was significant bleeding or other concerns. Plaintiff was seen in sick call April 29, 2005 and diagnosed with a nasal contusion with no treatment required.

Plaintiff was sent back to Western State Hospital on May 02, 2005, and was returned to Grays Harbor County Jail on May 10, 2005 on the following medications:

Gabitril 2 mg 2 x daily
Risperdal 4 mg at night
Dilantin 330 mg at night
Celexa 20 mg daily

On May 13, 2005, Defendant Alves saw Plaintiff at his request. Plaintiff had not been restarted on the Clonazepam at Western State Hospital and wanted it prescribed for him. He stated that he sued King County in the past due to medical issues. Plaintiff also wanted to go back on the Strattera as he felt that it helped him. Defendant Alves declined to give him the Clonazepam as he was on appropriate medications for his anxiety. Defendant Alves pointed out that Western State Hospital had not deemed it a necessary therapy either. Defendant Alves did prescribe the Strattera for him and referred him to Jan Kemmerer. Plaintiff was also given Benadryl for itching.

Plaintiff requested a refill of his Valtrex on May 21, 2005 and Defendant Alves refilled it on May 26, 2005.

On June 08, 2005, Plaintiff saw Mr. Deimerly in sick call – he was in no acute distress and Defendant Alves referred him to Jan Kemmerer.

On June 15, 2005, Defendant Alves saw Plaintiff in sick call for cellulites of his nose. He was treated with Bactrim DS 2x daily for seven days and Tylenol 1 gram 3 x daily for pain for seven days. At that time he reported that the Strattera was not helping his anxiety and lack of focus. He was referred to Jan Kemmerer.

On June 22, 2005, Defendant Alves saw Plaintiff to recheck the infection in his nose. It was well healed.

On June 23, 2005, Plaintiff was seen by Jan Kemmerer, ARNP. She prescribed an increased dose of Risperdal and weaning off the Seroquel. She did not prescribe Clonazepam. Plaintiff was transferred to prison later that week.

II. DISCUSSION

A. Standard of Review

Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626,

630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial, e.g. the preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W. Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute or controversy in favor of the nonmoving party only when the facts specifically attested by the party contradicts facts specifically attested by the moving party. Id.

The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W. Elec. Service Inc., 809 F.2d at 630 (relying on Anderson, *supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

B. Plaintiff Has Failed to State a Claim Under the Eighth Amendment

To state a claim under 42 U.S.C. § 1983: (1) the defendant must be a person acting under color of state law; and (2) his conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986). Implicit in the second element is a third element of causation. *See* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 286-87 (1977); Flores v. Pierce, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980). When a plaintiff fails to allege or establish one of the three elements, his complaint must be dismissed.

In the present case, Plaintiff claims that Defendant Alves denied or delayed medical care to him while he was incarcerated at Grays Harbor County Jail. Accordingly, his claims are analyzed under the Fourteenth Amendment Due Process Clause, rather than the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n. 16 (1979). However, because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment the same standards are applied. Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1198); Redman v. County of

San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991). The Eighth Amendment requires prison officials to take reasonable measures to guarantee the health and safety of inmates. Hudson v. Palmer, 468 U.S. 517, 526-27 (1984); Farmer v. Brennan, 511 U.S. 825, 834 (1994). An inmate claiming an Eighth Amendment violation relating to health care must show that the prison officials acted with deliberate indifference to a serious medical need. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The plaintiff must prove both an objective and a subjective component. Hudson v. McMillan, 503 U.S. 1 (1992); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992). First, the alleged deprivation must be, objectively, "sufficiently serious." Farmer, 511 U.S. at 834. A "serious medical need" exists if the failure to treat a prisoner's condition would result in further significant injury or the unnecessary and wanton infliction of pain contrary to contemporary standards of decency. Helling v. McKinney, 509 U.S. 25, 32-35 (1993); *McGuckin*, 974 F.2d at 1059. Second, the prison officials must be deliberately indifferent to the risk of harm to the inmate. Farmer, 511 U.S. at 834. An official is deliberately indifferent to a serious medical need if the official "knows of and disregards an excessive risk to inmate health or safety." Id. at 837. Deliberate indifference requires more culpability than ordinary lack of due care for a prisoner's health. Id. at 835. In assessing whether the official acted with deliberate indifference, a court's inquiry must focus on what the prison official actually perceived, not what the official should have known. *See* Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995). If one of the components is not established, the court need not inquire as to the existence of the other. Helling, 509 U.S. 25.

Prison authorities have "wide discretion" in the medical treatment afforded prisoners. Stiltner v. Rhay, 371 F.2d 420, 421 (9th Cir. 1971), *cert. denied*, 387 U.S. 922 (1972). To prevail on an Eighth Amendment medical claim, the plaintiff must "show that the course of treatment the doctors chose was medically unacceptable under the circumstances . . . and the plaintiff must show that they chose this course in conscious disregard of an excessive risk to plaintiff's health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996), *cert. denied*, 519 U.S. 1029. A claim of mere negligence or harassment related to medical problems is not enough to make out a violation of the Eighth Amendment. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Simple malpractice,

or even gross negligence, does not constitute deliberate indifference. McGuckin, 974 F.2d at 1059. Similarly, a difference of opinion between a prisoner-patient and prison medical authorities regarding what treatment is proper and necessary does not give rise to a § 1983 claim. Franklin, 662 F.2d at 1344; Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970). If a plaintiff is claiming a delay of medical care, then he must demonstrate that the delay was actually harmful. Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994) (per curiam); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990).

In this case, Plaintiff alleges that Defendant Alves failed to continue with the "regime of psychotropic medications which had been prescribed by the . . . psychiatrist at Western State Hospital." (Dkt. 9, p. 5). After viewing all of the summary judgment evidence in the light most favorable to the Plaintiff, the Court must conclude that Plaintiff's constitutional claim fails as a matter of law. Plaintiff has provided no medical evidence to show how he was harmed by not being provided with certain psychotropic medications or how any alleged damage or pain was proximately caused by any deliberate medical indifference of Defendant Alves. Indeed, Plaintiff has not identified which medications were denied him. At best, Plaintiff appears to be complaining that he was not treated in a manner that he wished to be treated, which is insufficient as a matter of law to give rise to a claim under Section 1983.

Conversely, the undisputed record reflects that during an incarceration of approximately seven months, the Plaintiff was seen approximately twelve times for medical treatment and medications. The record indicates that Plaintiff was provided with appropriate prescribed psychotropic medication by Defendant Alves during his incarceration at Grays Harbor County Jail. Accordingly, Defendant Alves' motion for summary judgment should be granted.

III. CONCLUSION

For the reasons stated above the court should **GRANT** Defendant Alves' motion for summary judgment and dismiss Plaintiff's claims against her with prejudice. A proposed order accompanies this Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file

written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **December 15, 2006**, as noted in the caption.

DATED this 17th day of November, 2006.

Karen L. Strombom
United States Magistrate Judge